Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Time Warner Cable	)	Docket No. 06-54
for Preemption Pursuant to Section 253	)	
of the Communications Act, as Amended.	)	
	)	

WRITTEN EX PARTE COMMENTS
OF COMMONWEALTH TELEPHONE COMPANY

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SUMMARY

The above-captioned proceeding raises policy questions regarding the appropriateness of allowing VoIP providers to pick and choose the matters as to which they will, or will not, submit to state telecommunications service regulation, and the ability of state commissions to determine whether wholesale providers that enable VoIP to interface with the public switched telephone network are entitled to the benefits of competitive local exchange carrier status. These are matters of national significance, impacting not just the South Carolina proceeding affecting Time Warner, but also pending proceedings before a host of state commissions, including a pending proceeding before the Pennsylvania Public Utility Commission, to which Commonwealth Telephone Company is a party. Accordingly, these comments are intended to provide the Federal Communications Commission with additional detail regarding the pending Pennsylvania proceeding, as an illustration of the broad reach of the questions posed in this docket, and urge the Commission to decide these issues, not individually in the context of Time

Warner's Petition, but rather globally in the context of the pending IP-Enabled Services proceeding.

DISCUSSION

Introduction

Commonwealth Telephone Company ("CTCo"), a rural telephone company providing service in the State of Pennsylvania, respectfully submits through its undersigned counsel these written *ex parte* comments in the above-captioned proceeding to amplify certain of the comments and reply comments earlier submitted. Specifically, CTCo believes it is important to provide for the record additional information regarding a proceeding before the Pennsylvania Public Utility Commission, to which CTCo is a party, that is relevant to the deliberations of the Federal Communications Commission ("FCC") in this matter.[1] Although CTCo was represented in the initial pleading cycle by the trade associations of which it is a member,[2] CTCo believes the additional comments provided herein, reflecting its unique position as a rural local exchange carrier ("LEC") that currently is engaged in a state proceeding addressing the appropriateness of issuing a CPCN in connection with the provision of Voice over Internet Protocol ("VoIP") services, merit this separate submission.

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[1] Application of Sprint Communications Company, L.P., to Offer, Render, Furnish or Supply Telecommunications Services as a Competitive Local Exchange Carrier and a Competitive Access Provider in the Commonwealth of Pennsylvania (hereinafter, Sprint PA Application"), Docket Nos. A310183F0002AMA, A310183F0002AMB, and A310183F0002AMC (hereinafter, the "Sprint PA Docket"). Sprint Nextel Corporation and the Pennsylvania Public Utility Commission filed comments in the instant proceeding, but did not reference or describe the matters presented in Sprint PA Docket.

[2] CTCo is a member of both the United States Telecom Association (US Telecom) and the Independent Telephone and Telecommunications Alliance (ITTA).

Background

Time Warner Cable ("Time Warner"), in its Petition for Preemption of the orders of the South Carolina Public Service Commission ("SCPSC") denying its application for extension of its certificate of public convenience and necessity ("CPCN") to certain areas served by rural LECs, contends that it has been prohibited from providing telecommunications service to rural customers in violation of Section 253 of the Communications Act of 1934, as amended.[3] A careful reading of the proceeding history, however, reveals that Time Warner apparently did not propose to serve rural end-user customers pursuant to its CPCN. Rather, Time Warner sought a CPCN for the purpose of selectively gaining certain rights and benefits associated with the status the CPCN would confer to Time Warner as a regulated competitive local exchange carrier ("CLEC"), while at the same time expressly reserving the right to provided unregulated VoIP service to its rural end-user customers. In essence, Time Warner's Petition asks the FCC to preempt the SCPSC's decision and grant the extension of its CPCN so that Time Warner can have its cake, and eat it, too.

Whether VoIP providers should be allowed to pick and choose the matters as to which they will, or will not, submit to state telecommunications service regulation is a policy matter of national significance. Accordingly, the FCC should decide the issues raised by Time Warner's Petition in the context of the pending IP-Enabled Services proceeding, thereby addressing globally, not individually, the proper classification and regulatory treatment of VoIP services and the underlying wholesale services that enable

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[3] Specifically, Time Warner's argument is captioned "THE PSC'S REFUSAL TO GRANT TIME WARNER CABLE A CERTIFICATE TO PROVIDE SERVICE TO RURAL CUSTOMERS VIOLATES SECTION 253(a)."

VoIP to interface with the public switched telephone network ("PSTN"). Determinations as to whether a given applicant does or does not meet the state statutory criteria for the award of a CPCN should be decided on their facts and merits on a case-by-case basis by the public service commissions empowered to do so in each state, just as the SCPSC did here. The FCC emphatically should not intercede in such individualized state decisions, particularly where, as here, the applicant clearly failed to meet the state's neutrally applied licensing criteria.

Time Warner Seeks the Benefits, but Eschews the Burdens, of CLEC Status

The fundamental problem presented by Time Warner's Petition is that it seeks the benefits of CLEC status without accepting the associated regulatory burdens. The South Carolina Office of Regulatory Staff, in its opposition to Time Warner's petition, states that Time Warner in the proceeding before the SCPSC "expressly states that the application should not be viewed as a concession or agreement that the services at issue in [its] application constitute telecommunications services, local exchange services, common carrier offerings or services that are otherwise subject to federal or state regulation nor that the entity [sic] providing the services are telecommunications carriers, local exchange carriers, IXCs, common carriers or other regulated entities."[4] This is the same problem presented in the Pennsylvania proceeding to which CTCo is a party, and raises serious policy concerns with regard to the potential impact on end-user customers

[4] Response and Opposition of the Office of Regulatory Staff to Time Warner's Petition for Preemption, filed April 7, 2006, in FCC Docket 06-54, at 2.

of empowering regulated CLECs to enable the provision of unregulated VoIP services in conjunction with use of the PSTN.[5]

The importance and the global nature of the policy questions implicated by Time Warner's Petition are illustrated in the comments filed on both sides. For example, Verizon (formerly MCI), which proposes to provide the wholesale services necessary to enable Time Warner's South Carolina VoIP service to interface with the PSTN, filed comments that starkly demonstrate the unsettled state of the law in this area, the broad reach of the issues presented, and the pressing need for greater regulatory clarity. In its comments, Verizon concedes that is unclear whether the wholesale service it would provide to Time Warner is a "telecommunications service" under 47 U.S.C. §153(46) entitled to Section 251 interconnection, or is "telecommunications" or an "information service" under 47 U.S.C. §153(20) or (43), in which case the FCC must make a public interest determination under Section 201 before interconnection with the independent LECs would be required. If the latter, Verizon argues, "the Commission should find

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[5] CTCo acknowledges that the SCPSC did not decide Time Warner's application based upon the policy issue discussed herein. Rather, the SCPSC correctly rejected Time Warner's application because it failed to meet South Carolina's statutory standards for issuance of a CPCN. CTCo is in agreement with the Reply Comments of the South Carolina Telephone Coalition ("SCTC"), which correctly assert that "[t]his matter involves nothing more than Time Warner failing to meet its burden of proof in a state administrative proceeding." Reply Comments of the SCTC, dated April 25, 2006, in FCC Docket 06-54, at 2. As such, the SCPSC did not impose a legal requirement that "prohibit[s] or has the effect of prohibiting" the provision of telecommunications service. It was Time Warner – not the SCPSC – that determined the fate of its application. The SCPSC's determination that Time Warner's application was deficient should be accorded due deference, and the Petition for Preemption denied. Nonetheless, the national policy issues raised by Time Warner's Petition do merit the FCC's consideration. CTCo agrees with the many other commenters that suggest these issues would best be decided in the pending IP-Enabled Services docket, FCC Docket 04-36, and not in connection with Time Warner's Section 253 preemption claim.

[pursuant to Section 201] that the public interest requires independent LECs to establish physical connections between their circuit-switched networks and the networks of competitive LECs that provide that telecommunications or that information service, and also to establish routes (*i.e.*, to exchange traffic) with those competitive LECs."[6] CTCo submits that such a far reaching "public interest" determination, by its very nature, is beyond the scope of the dispute between Time Warner, Verizon, and the SCPSC, and should be addressed in a proceeding that considers the issue in a national, rather than case-specific, context.

The Reply Comments of the South Carolina Cable Television Association ("SCCTA") highlight the concern that arises if the FCC were to decide that Verizon's wholesale services to Time Warner are, in fact, telecommunications services for which Verizon has Section 251 rights. SCCTA asserts that Verizon's wholesale services meet the definition of "telecommunications services" for purposes of 47 U.S.C. §153(46), because:

> When a CLEC provides telecommunications transport and interconnection services to a cable operator in order to facilitate the cable operator's VoIP customers' placing calls to end-users on the PSTN, that is "effectively" making the CLEC's services "directly available to the public." The fact that the public is reached through a VoIP-enabled cable system instead of a traditional local loop certainly means that this arrangement is not exactly like traditional service, but that clearly doesn't matter, both because the definition only requires "effective" availability to the public, and also because it applies "regardless of the facilities used."[7]

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[6] Comments of Verizon, dated April 10, 2006, in FCC Docket 06-54, at 11.

[7] Reply Comments of the South Carolina Cable Television Association, dated April 25, 2006, in FCC Docket 06-54, at 6.

Accepting this view, however, begs the question whether the CLEC provider of wholesale telecommunications service, as the entity "effectively" making service "directly available to the public," is thereby agreeing to assume all of the regulatory obligations associated with the provision of CLEC services to end-user customers. Verizon states that its wholesale service to Time Warner includes "E911-related connectivity; administration, payment, and collection of intercarrier compensation; local number portability; and the provision of operator services and directory assistance services."[8] Nowhere, however, does Verizon state that it is committing itself to be responsible to either the end-user customers of Time Warner's VoIP service or to the LECs to which Time Warner's VoIP traffic will be terminated to ensure the proper implementation of each of these regulated items. And, as the SCTC points out in its Reply Comments, "Time Warner's agreement to voluntarily and temporarily comply with 'applicable' rules regarding the payment of access charges, contributions to universal service, etc., must be balanced with and tempered by its full reservation of rights to take a contrary position and to argue that there are no 'applicable' rules with respect to its VoIP service."[9]

The Policy Issues Raised by Time Warner's Petition Have Broad National Implications, Including in Pending Proceedings in Other States

CTCo is submitting herewith for the FCC's consideration its Protest and Motion to Dismiss filed with the Pennsylvania Public Utility Commission ("PAPUC") in the Sprint PA Docket, which raises many of the same concerns as does the Time Warner

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[8] Comments of Verizon, *supra* n.6, at 2.

[9] SCTC Reply Comments, *supra* n.5, at 4-5.

proceeding.[10] As the Protest and Motion explains, Sprint is seeking CLEC authority to provide telecommunications services in the CTCo service territory. However, Sprint does not propose to provide retail services to end-user customers. Rather, "[t]he Applicant is seeking authority to offer competitive alternatives in telecommunications services, pursuant to §251(a) (direct and indirect interconnection) and §251(b)(2) (number portability), (3) (dialing parity) and (5) (reciprocal compensation) of the federal Telecommunications Act to competitive service providers seeking to offer local voice services."[11] As CTCo argues in its Protest, it is unclear whether the service Sprint proposes to provide is jurisdictional to the PAPUC, insofar as it is not local voice service to the public, in which case the PAPUC cannot issue a certificate to provide the service. In any event, it is clear that Sprint will only be providing service, not to the public generally, but rather as an interface between the PSTN and the cable companies that are providing the actual service to the end-user customer.[12] The revised Pennsylvania tariff, designed by Sprint to effectuate its Pennsylvania application, simply adds the recurring

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[10] Protest and Motion to Dismiss of Commonwealth Telephone Company, dated June 6, 2005, on file in the Sprint PA Docket (*see supra*, n.1) ("CTCo Protest"), attached as Exhibit A hereto.

[11] *Id.*, at 2. (Emphasis supplied.)

[12] Sprint PA Application, on file in the Sprint PA Docket (*see supra*, n.1), at 7 (paragraphs 10 and 12). [NOTE: CTCo has not attached all documents from the Sprint PA Docket cited herein, due to their size. However, upon request, we will be pleased to provide copies for the FCC's reference, except to the extent that documents or portions thereof have been designated confidential by Sprint. No confidential information is included in these Comments.]

statement that: "Sprint provides services to competitive service providers under contracted terms and conditions that are not part of this tariff...."[13]

CTCo's Motion to Dismiss the Sprint PA Application on the grounds that the services proposed by Sprint are not those of a local exchange company was denied by the presiding administrative law judge because "[t]he mechanics of the proposed service need to be developed clearly in order for a thorough review of the Application to occur... Here, the facts must be developed prior to the legal determination, and therefore, a hearing is necessary."[14] Developing the facts, however, has proven problematic. Sprint has taken the position that it cannot elaborate for the PAPUC the services or the consumer protections that end-user customers in Pennsylvania will receive, because it is Sprint's customer, Blue Ridge Cable, and not Sprint that will be the customer interface. The PAPUC does not currently have jurisdiction over the entity that will be using Sprint's wholesale services to connect end-user customers to the PSTN in CTCo's service territory. Consequently, the PAPUC can neither determine nor enforce any regulatory obligations on the part of the retail service provider.

After CTCo unsuccessfully attempted to obtain discovery about Blue Ridge from Sprint regarding basic matters, such as whether contributions to the universal service fund will be made, what end-user services will be offered, and what the configuration of Blue Ridge's network will be, CTCo moved the PAPUC to join Blue Ridge Cable as an

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[13] *See, e.g.*, Proposed Tariff at Section 3, on file in the Sprint PA Docket (*see supra*, n.1), at 3rd revised page 1.

[14] Order Disposing of Motions dated September 30, 2005, on file in the Sprint PA Docket (*see supra*, n.1), at 4.

indispensable party to Sprint's application.[15] However, the presiding ALJ denied CTCo's Motion to Join Blue Ridge stating that:

> [A]lthough CTCo is correct that Blue Ridge's participation is necessary to fully develop a record on the end user services that are proposed to be provisioned, that inquiry is appropriate for the certification of Blue Ridge, as the entity providing the end user services. While it would be convenient to have the application of Blue Ridge pending at the same time as this Application so that the [PAPUC] could have the entire picture before it at the same time, there is no legal requirement that the Applications be filed or considered together....[16]

Without Blue Ridge in the proceeding, it is impossible to know how – or whether – the regulatory obligations normally attendant to voice service to end-user customers will be met.

Similarly, there is a concern raised in the instant proceeding before the FCC regarding the responsibilities of the end-user service provider. Time Warner argues that the FCC should set aside this concern, because "Time Warner Cable has voluntarily submitted to the same requirements that govern competitive LECs, including contributions to the state and federal universal service support mechanisms, the payment of access charges where applicable, and the provision of E911 service, among other things."[17] But, Time Warner's use of the words "voluntarily" and "where applicable" are telling. Elsewhere in its pleading, Time Warner states: "In obtaining state authorizations, Time Warner Cable has expressly reserved its right to modify its policies

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[15] Motion to Join an Indispensable Party and Request for Suspension of Hearing Schedule, dated November 3, 2005, on file in the Sprint PA Docket (*see supra*, n.1), attached as Exhibit B.

[16] Second Order to Dispose of Various Motions dated November 18, 2005, on file in the Sprint PA Docket (*see supra*, n.1), at 4-5.

[17] Time Warner Petition for Preemption, FCC Docket WC 06-54, at 21.

in conformity with changes to the legal and regulatory regime applicable to VoIP-based services."[18] Time Warner also asserts that, "even if the Commission determines that such VoIP-based services are not telecommunications services [and, thus, not eligible for a CPCN], Time Warner Cable should retain the flexibility to structure the wholesale transmission functionality underlying the retail VoIP-based service as a common carrier offering – *i.e.*, a telecommunications service – if it so chooses. Indeed a service provider may be a common carrier for some purposes and not for others."[19] In other words, Time Warner, like Sprint, reserves the right to claim CLEC status when it is beneficial, and to disavow it when it is not.

Importantly, as has been illuminated in both the SCPSC and PAPUC proceedings, certificating the wholesaler allows the retailer to avoid regulatory jurisdiction, by claiming that it is an "information service" provider, while letting the certificated "telephone service" provider avoid the regulatory obligations it would otherwise incur, were it to directly connect end-user customers to the PSTN. Thus, in the Pennsylvania proceeding, Sprint seeks a certificate to enable it to obtain numbers, interconnection and intercarrier compensation as the CLEC, while the cable company can take the position that it is an "information service provider" and, hence, not jurisdictional. Certificating the wholesale services without certification of the end-user services potentially denies Pennsylvania telephone customers the protections of tariffs, PAPUC customer rights under Chapter 64,[20] slamming/cramming regulations, legible and understandable billing

[18] *Id.*, at 3.

[19] *Id.*, at 18.

[20] 52 Pa. Code Section 64.101 *et seq.*

requirements and even the option of lodging an informal complaint with the PAPUC Bureau of Consumer Services. Under this scenario, there also will be no payments to the Pennsylvania Universal Service Fund. Moreover, as the CTCo Protest sets forth, it appears that porting numbers to a non-telecommunications carrier, as Sprint seems to be proposing to do, would be contrary to the FCC's rules.[21]

Conclusion

If the FCC were to grant Time Warner's Petition for Preemption of the SCPSC's order, and allow Time Warner to pick and choose the purposes for which it becomes a CLEC, without rendering a more global decision on the overarching policy issues the Petition presents, state commissions across the country – including the PAPUC in the Sprint PA Docket – would be left with significant uncertainty regarding their authority to apply state statutory standards for the certification and regulation of providers proposing to enable the provision of unregulated VoIP services to end-user customers in conjunction with regulated services over the PSTN. To avoid such confusion, CTCo urges the FCC to reject Time Warner's Petition and decide the underlying policy issues in the IP-Enabled Services docket.

Respectfully submitted,

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Dated: May 18. 2006

[21] CTCo Protest, *supra* n. 10, on file in the Sprint PA Docket (*see supra*, n.1), at 9-10.